No. 16,292

United States Court of Appeals
For the Ninth Circuit

JACK PAUL BROWN,

Libelant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN DOE, d/b/a Kayler-Dahl Fish Company,

Respondent.

BRIEF OF APPELLANT.

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Proctors for Libelant.

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This suit comes before the Court on appeal from the judgment of the District Court in sustaining the exceptions of respondent and dismissing the libel.

PRELIMINARY STATEMENT.

A brief history of the case is presented in order to simplify an understanding of the issues.

Libelant was injured aboard respondent's vessel, the Homer, September 27, 1954, and sustained the serious injuries described in paragraph V of the second amended libel.

Libelant is an Indian and upon the accident engaged another Indian, an attorney named Wm. L.

Paul, Jr., to represent him. His attorney did some work on the case and prepared a complaint for damages under the Alaska two-year statute, and then abandoned his practice and departed from Alaska, whereupon libelant consulted his present proctors and engaged them to represent him. We investigated the facts surrounding the accident, made a trip to Seattle, Wash., where the barge was and took pictures of the vessel. Libelant during all the time was still undergoing medical treatment and his condition had not become definitely established for which reason it was decided to defer commencing suit as long as possible; that on September 18, 1956, suit was filed under the Alaska two-year statute; that before filing suit proctors learned from libelant that the barge Homer was owned and operated by a company known as Kayler-Dahl Fish Co., Inc.; that the complaint which had been prepared by Wm. L. Paul, Jr., named such defendant as a corporation; that before commencing the suit, however, proctors examined the Directory of Alaska Corporations, which directory listed the defendant as a corporation; that proctors relied on the information supplied them, and the directory, and brought the suit against defendant as the corporation hereinabove named; that after suit was filed, and after the expiration of two years from the date of accident, defendant filed a motion to dismiss on the ground that the corporation had been dissolved; that plaintiff in that suit could not amend by naming a new party because two years had then expired; that it then became obvious, if libelant was to have his day in court, a suit in admiralty was necessary and such suit was

filed on November 29, 1956; that exceptions were filed to the libel, based on laches, and an amended libel was then filed tending to excuse the delay in filing the suit, which exceptions were sustained by the Court; that with permission of the Court, a second amended libel was filed, to which exceptions were interposed and sustained by the Court and judgment entered dismissing the libel; that in sustaining the exceptions the Court held that respondent was prejudiced by reason of the delay in filing the second amended libel beyond the two-year statute, above mentioned.

The case is now before this Court on Points 1 and 2 listed on page 38 of the transcript which are to the effect that the Court erred in sustaining the exceptions to the libel and in entering judgment dismissing the libel.

ARGUMENT.

NATURE OF EXCEPTIONS.

While in some instances, in admiralty, the Courts in hearing exceptions consider affirmative matter, still, as a general rule, the exceptions are treated as a demurrer and all material facts set forth in the libel are admitted as being true.

The trial Court, in passing on the exceptions, apparently did consider the affirmative matter set forth in the exceptions, to the effect that libelant could have determined that the defendant against whom suit was filed under the two-year statute was not a corporation, and had been dissolved at the time of the accident, by

investigating the records of Alaska in the office of the Department of Finance at Juneau, Alaska, where such records were kept. This matter might constitute a defense. However, it should be plead in an answer where all the facts in connection therewith could be presented to the Court.

ON QUESTION OF LACHES.

We concede libelant is bound by the acts of his proctors.

If reasonable diligence was not used in filing the action under the two-year statute, and as a result thereof, respondent was prejudiced by the short delay, that is the interval of time from the date of filing suit under the two-year statute up to the time this suit in admiralty was filed, then the District Court should be upheld in dismissing the libel.

The principal argument of respondent in support of the exceptions is that libelant's proctors owed a duty to the libelant to make sure who was the proper party defendant and that they could have ascertained the true status of the defendant by checking with the office of the Department of Finance of Alaska where the records were kept. We concede that this could have been done.

However, we do feel that we were justified in believing that we had brought suit against the proper party and that we used ordinary care and diligence in order to determine the status of the defendant. We

were simply misled by the information we had before us, and by the directory upon which we relied.

If this be not true, and this Court so holds, then it would appear to us that our client would have a cause of action against his proctors for their failure to use that degree of care the circumstances required. This is the position taken by respondent and upon which it relied in urging its exceptions to the libel. In other words the alleged laches are attributable to the libelant.

The test would seem to be, if suit were instituted against libelant's proctors for failure to use ordinary care in determining the status of defendant, would this Court hold, as a matter of law, that the proctors were liable?

If so, then the District Court's judgment in allowing the exceptions and dismissing the libel was proper.

We respectfully urge upon the Court that the exactitude which must be employed in any given case should be dependent on the facts involved.

We relied on the authenticity of the Directory of Corporations we had in our office and which was used, and if we were wrong in so doing and were obligated to go further, then our client must suffer by losing his right to a day in court. That is, of course, provided respondent was prejudiced by the short delay in proceeding in admiralty.

The question then would be, was the District Court correct in holding, as a matter of law, that prejudice was presumed on account of the short delay beyond

the two-year period when the suit in admiralty was commenced.

The excuse plead in the second amended libel in failing to file the suit in admiralty within the two-year period is fully set forth. The fact is affirmatively plead that the owner of the assets of the dissolved corporation were owned by the present respondents. Unless it can be shown on a trial on the merits that other rights or interests were affected by the delay, which was very brief, or that witnesses who were available on the expiration of two years from the date of the accident were not available when the suit was filed in admiralty, then there could be no presumption of prejudice.

It was pointed out to the Court that fishing in Alaska is of a seasonal nature; that those persons engaged in such business usually leave Alaska after the fishing season and it would be possible and likely that libelant could establish upon a trial on the merits that the statute was actually tolled on account of the absence of the respondent from Alaska.

Without a trial on the merits the opportunity to do this would be lost.

In this connection, if possible, we ask this Court to permit an amendment to the second amended libel to the effect "that Libelant believes and alleges that the statute of limitation has been tolled on account of the absence of the respondent from Alaska between the date of the accident and the date the libel was filed."

Delay in commencing a suit in admiralty is not very serious or important, because if the delay is reason-

ably explained, or it is shown no prejudice has resulted from the delay, the time element in filing suit does not enter into consideration.

The decided cases contain many factual situations excusing the delay. Necessarily they all differ with respect to the facts, and there are not two cases with like facts.

The modern tendency of the Admiralty Courts is to abandon *a mechanical application of the doctrine of laches* (emphasis ours).

Judge Learned Hand, in the *Fulton* case, 54 Fed. 2d 467, 469, had this to say:

> "There has been an extraordinary delay. The libel was filed more than four years after the collision, which occurred nearly ten years ago. *In spite of the absence of any explanation we cannot see the delay ipso facto should defeat the claim*" (emphasis ours).

In the *Richard W. Walker v. Benjamin Foster Company* case, 1950, 92 F. Supp. page 402, Walker filed a libel alleging he was injured on July 19, 1946. The libel was filed on May 2, 1949. Respondent filed a motion to dismiss by reason of laches and the Court ordered a dismissal unless libelant wished to amend, which libelant did. After amendment was filed respondent filed its motion to dismiss and the Court stated as follows:

> "* * * Detriment to the adverse party is presumed from delay for the statutory period unless the contrary be shown. Libelant has undertaken to show the contrary, by means of the prelimi-

nary step of filing an amended libel containing the necessary allegations, pursuant to the order of the Court. At this stage of the proceedings, respondent is not in a position to preclude libelant from meeting the burden placed upon and assumed by him. No suggestion is made that the allegations of no prejudice to respondent are inadequate as a matter of law, nor may the respondent, upon exceptions, controvert those allegations. *It would make no difference if the facts pleaded in excuse of the delay were inadequate as a matter of law, as respondent urges, if it also appeared that the respondents were not prejudiced. For laches consists of inexcusable delay plus prejudice to the adverse party resulting from the the delay. If the libelant can overcome the presumption of prejudice, he will have overcome the presumption and the defense of laches.* The burden has been assumed by the libelant in his amended libel, and at the appropriate time it will be determined whether that burden has been met. The appropriate time cannot arise until a hearing has been held, after an answer, when the libelant will have the opportunity of advancing the proof of his pleadings'' (emphasis ours).

Therefore, if in this case the Court determines the delay is inexcusable (which we contend should not be done) still since there is no prejudice shown, and the demurrer or exceptions having admitted the allegation of no prejudice, the exceptions should not have been sustained.

In *Gardner v. Panama R. Co.,* U. S. Reports, page 29, U. S. Court of Appeals, Fifth Circuit, the Court stated:

> "Although the question of laches is one primarily addressed to the discretion of the trial Court, it should not be determined merely by a reference to and by a mechanical application of the statute of limitations; the equities of the parties must be also considered."

It is interesting to observe that in this case, the libelant also sued the wrong party, under an apparent misapprehension. In this case the petitioner's suit in admiralty was dismissed by the District Court, and affirmed by the Court of Appeals, but was reversed by the above Court of Appeals for the Fifth Circuit.

In *Pinion, Libelant v. Mississippi Shipping Co.,* 166 Fed. Supp., No. 5, page 652, U. S. District Court case, the Court followed the rule in the *Gardner* case, and stated:

> "Although a state statute of limitations may be used as a guide in admiralty, *it is not to be applied mechanically* and where it is shown that delay in filing the libel was excusable and respondent was not prejudiced by delay, the defense of laches is not successfully made" (emphasis ours).

In the case of *Louis McDaniel v. Gulf & South American Steamship Co., Inc.,* decided by the Fifth Circuit Court of Appeals, December 21, 1955, the libel was dismissed by the U. S. District Court, but reversed on appeal.

This is a very late case. It was urged by libelant that even though no inexcusable delay was shown, still if there were no prejudice shown, laches would be

overcome. While the Court did not specifically so hold, in view of the fact of finding that the delay was not inexcusable, still it is reasonable to infer that it would have followed the rule laid down in the *Walker v. Benjamin Foster* case hereinabove cited, and the decision by Judge Learned Hand in the *Fulton* case, cited above.

The general rule in cases like this one, is that the Courts are loath to decide the question of laches on exceptions; that where there is a question of fact it must be disposed of by a hearing on the merits, after an answer has been filed, where additional facts may be produced to offset the claim of laches, or additional facts may be produced in support of the libel, such as whether or not the statute has been tolled.

We wish to emphasize the fact that the trial Court ought not to have considered any affirmative matter urged by the respondent in the exceptions, because the only matter before the trial Court is the allegations of the second amended libel, which must be taken as true. The trial Court ignored the affirmative matter plead in defense of the doctrine of laches, and made a mechanical application of the doctrine and rule, holding that since the suit in admiralty was not filed within the two-year statute, prejudice was presumed.

Laches is a defense, and seldomly is passed on by exceptions, becauses in order to determine whether laches exist in any case, it is necessary that all the facts be before the Court.

C. H. Sprague & Son v. Howard, 68 Fed. Supp. page 348, sets forth the general rule, as follows:

> "The defense of laches under the admiralty practice, as in equity, is, as a rule, properly presented only by answer and not by exception unless the libel on its face shows laches as a matter of law."

This is a case where it is shown by the libel that the libelant has been disabled for life, due to the serious injuries he has received, which is admitted by the exceptions. It would be manifestly harsh and unjust if libelant were denied his day in court. In this connection we call attention of the Court to language used by the Court in the case of *National Oil Transport v. United States,* 18 Fed. 2d, page 35, as follows:

> "Court of Admiralty, though not technically a Court of Equity, may apply equitable principles to subject matter within its jurisdiction. So broad are the powers of a Court of Admiralty, and so extensive the considerations which impel its action, that it has been called, as distinguished from a Court of law, or a Court of equity, *a Court of justice"* (emphasis ours).

CONCLUSION.

The trial Court erred in sustaining the exceptions of respondent, and entering judgment dismissing the second amended libel.

Dated, March 3, 1959.

Respectfully submitted,

ZIEGLER, ZIEGLER & CLOUDY,

By A. H. ZIEGLER,

Proctors for Libelant.